features contained therein. The contents of the agreements are then evaluated within the context of contemporary developments as set forth in Part 1 of this inquiry. Primarily attention will be focussed on the 1929 and 1959 agreements.

Over the last one hundred years several[1] agreements have been concluded to regulate utilization of the Nile waters in one way or another. These include agreements concluded between the colonial powers; the 1929 Nile Waters Agreement; and Post-Independence agreements.

1. AGREEMENTS BETWEEN COLONIAL POWERS

At the peak of colonial rivalry in Africa, a number of instruments relating to the Nile River were signed. Though these essentially dealt with boundary demarcation and definition of territorial spheres of influence, some of the provisions directly referred to the utilization of the Nile River.

Earliest among them was the Anglo-Italian Protocol

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1 UN FAO, Systematic Index of International Water Resources, Treaties, Declarations, Acts and Cases by Basin, Legislative Study, hereafter ST/LEG/SER.B/12 (FAO: Rome, 1978), p.374.

of 1891[2] delimiting the two Parties' "Respective spheres of influence in East Africa from the Ras Kasar to the Blue Nile" in Article 111 stipulated.

> The Italian Government engages not to construct on the Atbara, in view of irrigation, any work which might sensibly modify its flow into the Nile.[3]

On 15 May 1902,[4] Emperor Menelik 11, signed a treaty with Great Britain regulating the boundary between Ethiopia and the Anglo-Egyptian-Sudan in which it was inserted in Article 111 a provision binding the Emperor:

> ... not to construct or allow to be constructed any work across the Blue Nile, Lake Tana or the Sobat which would arrest the flow of their waters except in agreement with his Britanic Majesty's Government and the Government of Sudan.[5]

Two articles contained in the London Agreement of 9 May 1906[6] between Great Britain and the Independent

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2 British and Foreign State Papers (Hereafter BFSP), Vol. 83, p.19, United Nations Legislative Series, Legislative Texts and Treaty Provisions Concerning the Utilization of International Rivers for Other Purposes than Navigation (ST/LEG/SER.B/12 (FAO: Rome, 1963), pp.127-128.

3 Ibid.

4 BFSP, Vol.95, p.467; ST/LEG/SER.B/12, pp.115-116.

5 Ibid., p.116.

6 BFSP, Vol.99, p.173; ST/LEG/SER.B/12, p.99.

State of the Congo (more properly King Leopold 11 of Belgium), modifying the Brussels Agreement of 12 May 1894 in respect of their spheres of influence in East and Central Africa are worth noting. Article 111 committed the Independent State of the Congo:

> ... not to construct or allow to be constructed any work on or near the Semliki or Isango River, which would diminish the volume of water entering Lake Albert except in agreement with the Sudanese Government.[7]

Article V111 of the same agreement provided the mode of dispute settlement should it arise. In case of failure of diplomatic means to reach a settlement, the Parties consented to submit such disputes to compulsory arbitration of the Hague Tribunal.

With the belief that the Ethiopian Empire would soon disintegrate, and foreseeing the need for an arrangement to share the spoils on lines similar to the earlier Dual Entente (Britain and France), the Tripartite Agreement of 13 December 1906[8] or "Arrangement Concernant L'Abyssinnie" between Britain, France and Italy, resolved in Article 4(a) to protect:

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7 Ibid.

8 Hertslet, Map of Africa by Treaty (London, 1967), p.442.

> The interests of Great Britain and Egypt in the Nile Basin, more especially as regards the regulation of the waters of that river and tributaries (consideration being paid to the local interests mentioned in Article 4(b).[9]

The four set of agreements outlined above constitute the rudiments of the Nile legal framework prior to World War 1. Following features have a bearing on international law:-

1. Excepting the 9 May 1906 Agreement between Britain and France and Emperor Menelik 11, all the other three instruments were contracted between colonial powers purportedly on behalf of the colonial peoples in their respective spheres of influence, Britain being a signatory to all of them.

2. The agreements were incidental to boundary settlement issues.

3. All the four agreements imposed absolute limitation on the control of the river by the upstream states. The principle of absolute territorial integrity or natural flow theory was uniformly reproduced in Article 111 of each of the treaties except in the fourth agreement, thus laying foundation for the veto clause on the Nile regime.

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9 *Ibid.*

4. The fourth dominant element in the said agreements is the principle of priority of uses where irrigation in Egypt was given precedence over all other uses elsewhere. However, the Tripartite Agreement of 1906 gave recognition "to the local interests."

11. INTER-WAR PERIOD AGREEMENTS

During this period some more treaties were concluded, but two are of utmost significance. These are the 1934 Anglo-Belgian Agreement and the 1929 Nile Waters Agreement between Egypt and Great Britain. Because of the unique character of the latter instrument, it is proposed here to depart from a chronological order by disposing off the 1934 Agreement first.

A. Anglo-Belgian Treaty, 22 November 1934[10]

Unlike the first set of agreements, this treaty was designed specifically to define water rights between the signatories. The agreement covered those waters shared by the Mandated Territories of Tanganyika and Ruanda-Burundi. It departs from the earlier treaties in so far as it was innovative in certain aspects, such as

10 League of Nations Treaty Series, Vol.190, p.104; ST/LEG/SER.B/12, pp.97-99.

distinguishing between contiguous and successive waters, and inclusion of pollution control.

Article 1 contained provisions on conditions governing diversions and return of water in successive rivers. It was expressly agreed that either Party possessed the right to divert waters within its territory so long as such waters "shall be returned without substantial reduction to its natural bed", but this, however, had to be effected "at some point before such river or stream flows into the other territory..."

In the case of contiguous or boundary waters, the agreement specifies the uses to include mining and industrial uses.[11] While recognising the right to divert waters:-

> Each contracting party shall have the right to divert for operations of a mining industrial nature, at any point where a stream forms a boundary between the two territories up to a maximum of half the volume of water flowing at such point measured during the season of low water, provided that such water after use shall without substantial reduction be returned to its natural bed.[12]

The agreement also establishes a method for the determination of the flow of the water in the streams and a

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11 *Ibid.*, Art.lV, ST/LEG/SER.B/12, p.98.

12 *Ibid.*

point at which such determination would be carried out.[13]

Of interest is the provision requiring prior notice before commencement of operations for utilization of water for irrigation. Article Vl provided that where a Party wished to utilize water for irrigation purposes,

> ... such party shall give to the other notice of such desire six months before commencing operations ... in order to permit the consideration of any objections which the other contracting government may wish to raise.[14]

Probably the most innovative aspect of the agreement is Article 111 which was directed towards <u>protection of water against pollution</u>, (emphasis added) both in successive and contiguous river systems. It stated:

> No operations of a mining or industrial nature shall be permitted by either of the contracting governments in Tanganyika or Ruanda-Burundi respectively which may pollute or cause the deposit of any poisonous, noxious or polluting substance in the waters of any river or stream forming part of the boundary between Tanganyika Territory and Ruanda-Burundi or any tributary river or stream thereof, or in any stream flowing from one territory into the other.[15]

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13 <u>Ibid.</u>, Art.V.

14 <u>Ibid.</u>, Art.Vl.

15 <u>Ibid.</u>, Art.111.

In Article 11, the Parties set a priority of uses by prohibiting one another from undertaking mining or industrial activities the effect of "which may in any way lessen or otherwise interfere with existing navigable waters". Thus, by this Article, navigation took precedence over industrial and mining uses of the waters defined in the agreement.

Articles V11 and V111 respectively covered conditions for awarding grants, inspection, and the right of access of officials. While Article V11 guaranteed officials of either Party to inspect installations in or near successive rivers, Article V111 permited officials from either side, including the inhabitants, "to have access to any point on any river or stream forming the common boundary for any domestic or industrial purposes".

The ninth article contained two principles. It opened freedom of navigation on the river and respect for customary rights.

Procedures for dispute settlement, should the occassion arise, it set in the last article[16] in which the contracting parties consented to submit disputes to arbitration as mutually agreed upon.

To summarise the agreement, the following princi-

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16 Ibid., Article 10, pp.98-99.

ples may be underlined:-

1. The Agreement distinguishes between contiguous and successive waters.

2. Unlike the pre-world War 1 treaties that invoked the doctrine of absolute territorial integrity or natural flow theory, the 1934 Agreement recognizes the right of each riparian to divert shared waters, but only limits this right. Thus the emergence of "the principle of reasonable uses".

3. Apart from the most recent Agreement forming the Kagera Basin organization, no other Nile River Treaty, specifically refers to pollution problems. It is on this count that the Anglo-Belgian agreement is of unique importance.

4. Equally important is the requirement to notify either party of any proposed works, but within a specified time-limit of six months.

5. By Article 9, the customary rights of the inhabitants as to fishing, aquatic plants and domestic purposes were recognized.

6. The other feature to note is onerelating to the right of access and inspection conferred on both

parties in respect of installations in one of the other party's jurisdiction.

7. Lastly, is the mechanism for dispute settlement where arbitration is given preference.

B. The Nile Waters Agreement of 1929:[17]

Of all the agreements entered into to regulate the Nile waters the 1929 instrument is of far-reaching significance. It is considered a landmark in the development of the Nile doctrine and its provisions have provoked lively debate between commentators. The agreement was an outcome of protracted negotiations between Egyptian authorities and the British in which the former attempted to gain firm political control over the waters of the river. Because of its peculiar nature directly related to the Sudanese status, it would be appropriate to preface the background leading to its conclusion.

1. The Nile Projects Commission[18]

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17 LNTS, Vol.93, p.44; ST/LEG/SER.B/12, pp.100-107.

18 For a detailed background to the Commission, see, Willocks, The Nile Projects (London, 1920); Egyptian Government, Report of the Nile Projects Commission 1920 (Cairo, 1921); A. Toynbee, Survey of International Affairs, 1925 (London, 1926), Vol.II, pp.253-269.

The introduction of perennial irrigation to the Gexira in the Sudan, as it was noted in Chapter lV, touched on Egyptian sensitivities and created frequent controversies with the British officials.[19] At the beginning of the twentieth century, a master control scheme of Nile projects was drawn up with the view to increasing water supply in the Sudan and Egypt in order to meet expanding irrigation requirements in the two countries. Authored by Sir Murdoch Macdonald,[20] the then Egyptian Minister of Public Works, the scheme envisaged key control works to comprise of Sennar and Jebel Aulia Dams, Nag Hammadi Barrage, a Reservoir in Lake Tana, the Lakes Albert-Victoria Reservoir and the Sudd Channel Project. These proposals became a subject of severe criticism in Egypt. Sir Murdoch Macdonald was accused of having manipulated vital data to justify the Gezira Scheme at the expense of Egypt.[21]

To reassure themselves, the Egyptian Government in the same year (1920), appointed the Nile Projects Commi-

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19 Ibid.

20 Ibid.

21 Ibid., See also R. K. Batstone, "The Utilization of the Nile Waters" International and Comparative Law Quarterly, Vol.8, (1959), p.328; Sayed Hosni, "The Nile Regime", Reveue Egyptiennie De Droit International, Vol.17 (1961), p.74.

ssion of Enquiry composed of a nominee of the Government of India as its Chairman, a British nominee and an American nominee. The Commission was asked "to give to the Egyptian Government its opinion of the projects prepared by the Ministry of Public Works with a view to the further regulation of the Nile supply for the benefit of Egypt and the Sudan", and "to report upon the propriety of the manner in which, as a result of these projects, the increased supply of available water provided by them will be allocated at each state of development between Egypt and the Sudan".[22]

2. <u>Findings and Recommendation of the Commission</u>[23]

(a) The Commission endorsed the proposal to construct the Sennar and Gebel Aulia Dams, together with Nag Hammadi Barrage, but recommended further study on the other schemes.

(b) It revised water allocation forecasts from 50 to 58 milliard cubic metres for Egypt, but did not quantify the Sudanese water requirements.

(c) As to Egypt's water rights, the Commission

22 Egyptian Government, n.18, p.5.
23 <u>Ibid</u>.